87-703 (1)

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the Fourth, Fifth and Sixth Amendments prevent the Government from seizing prior to trial, and thereafter retaining, a defendant's private property that is concededly unrelated to any offense and is needed to pay counsel?

2. Under this Court's decisions in *United States* v. *Rauscher*, 119 U.S. 407 (1886), and *Johnson* v. *Browne*, 205 U.S. 309 (1907), may an extradited defendant challenge the legality under U.S. law of his extradition?

3. Is restitution under 18 U.S.C. § 3651 limited to payments to persons who are adjudicated victims?

4. Are the Fifth and Eighth Amendment rights of an alien defendant, and applicable statutes, violated when after prison he is detained in the United States in spite of findings that he has relinquished control of sufficient assets to pay restitution, that he is now consequently a pauper, and that "no further probationary purpose is to be served" by detaining him any longer?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 3, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit issued April 10, 1987 is reported at 814 F.2d 1329 and is reproduced at Appendix B. The amendments to that opinion issued by the Court of Appeals on petition for rehearing are reproduced at Appendix A; they are incorporated in a revised version of the amended opinion at 827 F.2d 424. The oral opinion of the District Court refusing to return petitioner's property after trial is reproduced at Appendix F.

JURISDICTION

The first judgment of the Court of Appeals was entered April 10, 1987. A timely petition for rehearing was filed April 20, 1987. The order entering an amended

opinion and judgment and otherwise denying rehearing was entered September 3, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States, 18 U.S.C. § 3651, Rule 41(e), Fed. R. Crim. P., and pertinent portions of the Treaty of Extradition with Switzerland are reproduced at appendix K.

STATEMENT

This petition is limited to four aspects of a federal criminal proceeding. Petitioner, a Belgian, was for thirty years a real estate broker in Brussels. As the District Court observed, previously he "never has been in trouble." R. 1023. He was extradited from Switzerland while on a business trip there and tried in the United States District Court for the Central District of California at a jury trial presided over by the Honorable A. Andrew Hauk, Senior United States District Judge. Petitioner was convicted along with two Americans (Alan Blair and another) on two charges: one count of wire fraud (18 U.S.C. § 1343), and one count of causing interstate transportation of a victim of fraud (18 U.S.C. § 2314). The allegation was that petitioner had encouraged the owner of a Belgian brokerage house, Roger Biard, to lend money to a partnership formed by Blair, secured by a Kansas real estate mortgage which proved to have no value. The borrowers repaid $800,000 of Biard's $1,000,000 loan, but $200,000 remained unrecovered. After Blair told Biard he was unable to repay the balance, and after a judge in Switzerland (where Biard's funds had passed) declined to act on Biard's complaint, Biard contacted U.S. prosecutors, who obtained a federal indictment.

At trial the objective facts with respect to petitioner were virtually undisputed. The issue as to him was state

of mind—whether, in encouraging Biard to invest with Blair, petitioner had been an accomplice of Blair, or instead had been simply another of many people whom the Government sought to prove Blair had fooled. The trial court, although it had called the prosecution's case a "house of cards," R. 762,[1] allowed the case to go to the jury, which after three days of deliberations resolved the issue against petitioner. Denying post-trial relief, the court commented that "He had an excellent reputation and character but they still came in with a conviction." R. 1020. Petitioner received a lighter sentence than the other two defendants, and was immediately released from prison, where he had spent more than a year in pretrial confinement. However, he was put on probation and ordered to remain in the United States until he paid restitution to Biard of $34,501.26, plus additional restitution to a trial witness in the amount of $458,373.89. P. 35a, *infra*.

On appeal, petitioner challenged *inter alia* the legality of the Government's pretrial seizure and continuing retention of his life's savings, that prevented him from paying for his defense or supporting his minor children; the legality of his extradition itself; the trial court's order that he pay over $458,000 to a non-victim trial witness; and the legality of the court's order forbidding him to leave the United States until all restitution had been paid. The Ninth Circuit affirmed on the first three points and did not rule on the last, instead simply remanding the sentence condition to the District Court to reconsider. P. 24a, *infra*. On petition for rehearing, the Court of Appeals after five months issued several pages of additions and deletions amending its opinion, but entered the same judgment. Pp. 1a-5a, *infra*. The

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[1] Near the end of the trial the court commented that "all of my notes show that Blair and Bilton are the only two involved in this," and added, "I know the government is getting very close to the end of the rope . . . ." R. 861, 872. Citations to "R." are to the record in the Court of Appeals.

four holdings for which certiorari is sought are summarized here in turn.

A. Taking of Property.

Petitioner lived and worked all his life in Brussels, Belgium, and kept his savings in nearby Switzerland. Petitioner's savings were invested in stock in two closely-held Panamanian companies that owned Spanish real estate, called Abamar Corporation and Batimar Corporation. He kept his two stock certificates, worth over $1 million, along with clients' deeds from his real estate business and some personal items, in a safe deposit box at a bank in Geneva. The two stock certificates, the undisputed record established and the Court of Appeals acknowledged, p. 22a n.6, *infra*, had remained dormant since 1973, six years before any acts or offenses charged in the indictment. They concededly had nothing to do with any offenses charged.

At the time of petitioner's extradition, U.S. prosecutors, with no factual support or probable cause, repeatedly asserted to the Swiss authorities that the two certificates were fruits or evidence of the crimes charged.[2] They demanded that the contents of his safe deposit box

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[2] For example, a U.S. State Department official told the Swiss police:

> "We have traced these funds to van cauwenberghe's account at credit suisse and we believe that he may have invested some or all of this money in companies held on his behalf at fides societe fiduciare. Fides has held, in trust for van cauwenberghe, ownership interests in hexagonal valley, batimar and abamar.
>
> "Because they constitute assets that were involved in the scheme or may have received scheme proceeds, we ask that any shares in these companies or in any other entities held for van cauwenberghe at fides be frozen so that they may be delivered up with van cauwenberghe at the time of extradition." R. 85.

The Government never made those allegations in any U.S. court and never attempted to support them.

be handed over to U.S. prosecutors along with petitioner himself. After hesitating, the Swiss complied. Then, reconsidering the initial seizure, a Swiss court ordered one of the certificates released as not covered by the treaty, which authorizes seizure only of items on the accused's person or evidence of the crime. R. 83-84. But the U.S. officials protested, and assured the Swiss that the U.S. Government had cause to believe that petitioner's assets were the fruit of the alleged 1979 crime. R. 85. The Swiss reinstated the seizure, R. 86-87, and delivered petitioner's two stock certificates to U.S. officials, who transmitted them to prosecutors in Los Angeles.

Petitioner in the U.S. District Court challenged the Government to demonstrate any right to his property, and also explained that he needed to sell or pledge these assets in order to pay counsel and defend himself. The Government, abandoning all its earlier representations to the Swiss, declined to assert in a U.S. court that it had ever had any basis to say that this property was either evidence or fruit of any crime at all. But it also refused to give the property back. Petitioner formally moved under the Fourth, Fifth and Sixth Amendments and Rule 41(e) of the Federal Rules of Criminal Procedure that his property be returned to him. The Government then for the first time asserted that

> "the Court possesses inherent authority by virtue of its broad equity powers to hold these assets pending resolution of the criminal charges against Van Cauwenberghe." R. 107.

Petitioner's counsel protested that "Mr. Van Cauwenberghe needs this money to defend himself," R. 277uu—not only to pay retained counsel, but also to pay substantial expenses of interviews and investigation in Europe and transportation of defense witnesses from Belgium. The District Court replied, "You want to get ahold of the stock so he has got something to pay attorneys fees with. . . . Try to get it." R. 288. The Court concluded:

> "knowing that there is a victim out there wanting part of that property, do you think I am going to give it back to Van Cauwenberghe? Whether the government has an interest or not, I wouldn't do it." R. 286.

After the trial, petitioner renewed his request that the property—found to be worth over $1,000,000, more than $500,000 more than the restitution ordered—be returned to him. The District Court, exclaiming that "I am going to make case law," refused. The court directed that the certificates be turned over jointly to the prosecutor and to petitioner's attorney with instructions to liquidate them as soon as possible and return the proceeds to the District Court. Pp. 29a-32a, *infra*. Petitioner appealed both the initial seizure and the continued retention, again claiming violation of the Fourth, Fifth and Sixth Amendments.

The Court of Appeals acknowledged that "the district court may have been under a duty to return property that neither was contraband nor had any evidentiary value." P. 22a, *infra*. However, the Court of Appeals held, no such duty applied here, because it said that although petitioner remained "the beneficial owner" p. 4a, *infra*, nevertheless by complying with the District Court's order to transfer custody of the stock to his attorney and the prosecutor to assure the proceeds would be remitted to the court after sale, petitioner had abandoned the interest necessary to have his constitutional claim heard on appeal.[3] Accordingly, the Ninth Circuit affirmed the District Court and denied any relief.

B. Extradition.

The Government obtained petitioner's presence for trial by extradition from Switzerland, invoking the 1900 extradition treaty with that country, 31 Stat. 1928, which allows extradition for "obtaining money or other

[3] The Government had never made such an argument, but adopted it in response to petitioner's petition for rehearing.

property by false pretences." Petitioner moved to dismiss in the District Court on the ground that the two offenses with which he had been charged—wire fraud (18 U.S.C. § 1343) and causing interstate transportation of a victim of fraud (18 U.S.C. § 2314) [4]—were not among the limited offenses made extraditable by the treaty, and that indeed the fact they were not had been officially acknowledged by the Departments of State and Justice for many years. He placed in the record statements of the Attorney General and the Secretary of State themselves so stating, and other official documents to the same effect. See pp. 39a-42a, *infra*.

In addition, petitioner submitted uncontroverted government documents showing that U.S. officials in order to obtain his extradition had repeatedly told the Swiss authorities that he had been indicted for "fraud" or "false pretenses," that they had caused pressure to be brought to bear on the Swiss judiciary, and that they had falsely told the Swiss that conviction of the offenses with which he was charged required inducement, reliance, and the surrender of something of value—the basic elements of false pretenses or fraud. The Government's only response was that its inaccurate statements to the Swiss (which were never denied) were irrelevant, because the Swiss had been furnished with the texts of 18 U.S.C. §§ 1343 and 2314 and therefore should be able to discern for themselves the elements of those U.S. crimes. The District Court denied petitioner's motion summarily.

The Court of Appeals never discussed the misrepresentations or the scope of the treaty at all. Instead, it broadly held that petitioner could not be heard in a court of this country to complain about violations of law connected with his extradition. Adopting the Government's words, it said the issue "is within the sole purview of the

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[4] The Swiss denied extradition for a charge of conspiracy, 18 U.S.C. § 371

requested state," and "[w]e therefore defer to the Swiss Federal Tribunal's decision as to Van Cauwenberghe's extraditability . . . ." Pp. 13a, 14a, *infra*. It made no reference at all to the leading case on which petitioner had relied, *United States* v. *Rauscher*, 119 U.S. 407, 430 (1886), which held that a defendant who has been extradited "can only be tried for one of the offences described in that treaty."

C. Restitution Order.

The Court of Appeals described the charge for which petitioner had been indicted as participating in "a scheme to defraud Roger Biard, a Belgian investment broker, and a Belgian corporation owned by members of the Vanden Stock family." P. 7a, *infra*. Therefore, petitioner argued on appeal, although the probation statute permitted the order of $34,000 restitution to Biard, the District Court had authority to order payment of more than ten times that amount—over $458,000—to a witness at the trial who was involved in counts never tried and later dismissed, and who by his own testimony had not lost anything. That witness, Roger Vanden Stock, testified that the Vanden Stock corporation alleged to have lost its investment was owned by his father; and because the District Court specifically limited trial to two counts involving Roger Biard, the jury never was instructed regarding any Vanden Stock counts. Petitioner relied on cases from six circuits holding that except as part of a plea bargain, restitution under 18 U.S.C. § 3651 cannot be ordered paid except to a person who has been adjudicated a victim. The Court of Appeals mentioned none of those cases and affirmed the award.

D. Exile.

Petitioner is a widower with three children left behind in Brussels. The record shows that since he was arrested and his assets seized, his children, except for one daughter who in his absence married, have had to subsist on charity and gifts from relatives. When he requested ex-

pedited relief from the sentence that required him, even though he had fully served his prison term, to remain in the United States, R. 36a, a motions panel of the Ninth Circuit remanded to the District Court with a direction to make a finding whether there was any further reason to forbid him to go home to his family. P. 27a, *infra*. The District Court then made a specific finding that "no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States." P. 38a, *infra*. Nevertheless, it refused to order him released. Then the three different judges who composed the merits panel of the Court of Appeals did not address at all petitioner's argument that to continue to hold him was on its face unauthorized by law. Instead, without mention of his legal contentions, the court simply remanded to the District Court to consider once more. (Thereafter, the District Court again refused to change its order, saying that even though petitioner had assigned control of his assets, it would not permit him to return home until they had been fully liquidated and all the proceeds paid into the court; full payment may not be possible for years.) Petitioner remains in the United States, separated from his family and not allowed to work.

REASONS FOR GRANTING THE WRIT

Although other substantial errors were committed during petitioner's trial,[5] they are not presented here be-

[5] The atmosphere of the trial was dominated by the District Judge's unique manner, comments and rulings. The trial record is punctuated, for example, with such statements from the Bench as: (on evidence) "Anything and everything comes in," R. 229; (on objections) "I said—shut up. . . . I think you are all cracked on this case," R. 511; "I am going to shut you up. You remind me of Santa Claus Number Two," R. 775; (on scope of inquiry) "I suppose I wouldn't let them try to find out . . . whether or not he masturbates," R. 315-16; (on decorum) "I almost sent that one kid [a defense attorney] yesterday to the dungeon for interrupting me," R. 271; (to female defense counsel) "Yes, my dear," R. 466; (on rape victims) "the man didn't get anything from her, except

cause they do not create conflicts in the circuits or otherwise meet the standards of this Court's Rule 17. This petition is confined to four rulings of law which the Court of Appeals allowed to stand that do raise such conflicts. One of these—tolerating the continuing enforced unlawful exile of a father from his children—violates this Court's decisions and is unspeakably cruel. Another—allowing the assertion of "inherent authority" to seize and hold a defendant's property needed for his defense—is a fundamental challenge to the rule of law in an adversary system.

I. DECISIONS OF OTHER CIRCUITS AND OF THIS COURT FORBID THE TAKING OF A DEFENDANT'S PROPERTY THAT IS UNRELATED TO ANY OFFENSE.

A. To Permit Seizure and Retention of Private Property Needed to Pay for Legal Defense Is in Direct Conflict with Recent Decisions of the Fourth and Fifth Circuits.

Whether prosecutors have power to seize, and trial courts to withhold, a defendant's assets that are needed to pay counsel and for other costs of defense, is an issue that for three years has been roiling the lower courts. Nearly every federal court which has addressed the question has ruled, by statutory construction or constitutional holding, that even when (unlike here) the Government claims to have acquired authority for such a seizure from forfeiture provisions of recent acts of Congress, nevertheless the Fifth and Sixth Amendments deny such power.

Over the past year this basic constitutional question of prosecutorial power has reached the court of appeals

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if you want to put it crudely, a good piece," R. 192; (on the Federal Rules of Criminal Procedure) "They [federal judges] don't look at them. The Chief Justice will be the first one to tell you that," R. 277y; (on denying testimony from the only corroborating witness) "I don't see a problem. . . . Mr. Van Cauwenberghe has his own testimony," R. 323, 325.

level, and has been decided in two circuits prior to the present case. Both the Fifth and Fourth Circuits rejected the Government's assertion with forceful opinions. *United States* v. *Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987); *United States* v. *Harvey*, 814 F.2d 905 (4th Cir. 1987).[6]

The Ninth Circuit here, by contrast, has allowed a seizure of a defendant's assets, even though it was totally lacking even colorable statutory authority, to stand. Prior to trial, petitioner's counsel told the court, "The problem is Mr. Van Cauwenberghe needs this money to defend himself." R. 277uu. He explained that besides legal fees, "Each witness, who has got to be brought over to this country is going to cost several thousand dollars. Mr. Van Cauwenberghe needs this money for his defense, and he is being deprived of this property at this point without due process of law." R. 277yy.

Petitioner's motion relied on the Fourth and Fifth Amendments, as well as the Sixth Amendment's guarantee of "the Assistance of Counsel for his defense." The Government's response was bold, aggressive, and shocking. It made no assertion—as it could not—that the property was evidence, fruit of a crime, or forfeitable under any statute.[7] Instead, the Government told the District Court, it relied on "inherent" authority to seize

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[6] The Solicitor General did not seek certiorari in either case, even though the latter held an Act of Congress unconstitutional. The Government did seek and obtain a pending rehearing in *United States* v. *Caplin & Drysdale*, No. 86-5050 (4th Cir. 1987), one of the three cases decided *sub nom. United States* v. *Harvey*, in which the appellant was not a criminal defendant but rather a law firm, which the Government on rehearing argued *inter alia* had "no standing to complain." The Government did not seek review of the other two *Harvey* cases.

[7] Article XII of the extradition treaty allows seizure and delivery of "articles seized which are in the possession of the person

and hold an indicted person's assets. In the Government's words:

> "[T]he Court possesses *inherent authority* by virtue of its broad equity powers to hold these assets pending resolution of the criminal charges against Van Cauwenberghe." R. 107 (emphasis supplied).

Elaborating, the Government told the court:

> "It would be in keeping with this heightened regard for victim rights for the Court to exercise its *inherent powers* of equity and maintain these assets in the Registry of the Court until there has been a final disposition of the criminal charges against Van Cauwenberghe. By so doing, the Court would deny Van Cauwenberghe an opportunity to dissipate the assets prematurely. The Court thus would preserve its ability to impose restitution as part of its sentencing of Van Cauwenberghe in the event he is convicted of the charges in this case." R. 107 (emphasis supplied).

The District Court, amazingly, accepted the Government's claim of power, and denied petitioner's motion for return of the property. The District Court's response to petitioner was totally callous. The court replied, "you lawyers—you want the money—I know." The court chuckled that, "He's already got you on credit, so that's pretty good." R. 277uu-zz. The court concluded:

> "I know what your feeling is. You want to get ahold of the stock so he has got something to pay attorneys fees with. I know what it is all about. . . . Try to get it." R. 288.

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demanded, at the time of his arrest." See p. 50a, *infra*. The Secretary of State ruled that this treaty provision with Switzerland does not apply to "property not in the possession of the accused." Secretary of State Knox to Minister Ritter, Feb. 26, 1913, reprinted in 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 205-06 (1942); see also 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1061-62 (1968).

After the trial, the District Court announced that "I am going to make case law," R. 1007, and still refused to release the property, even though the court found that its value far exceeds the restitution amount. On appeal, the Ninth Circuit did not address petitioner's Fifth and Sixth Amendment claims, nor even mention the Fourth Circuit's supervening decision, to which he had called the court's attention. The Ninth Circuit simply chose to ignore those constitutional claims entirely.

What happened here is irreconcilable with the law in other circuits. The Fifth Circuit in *United States* v. *Thier*, *supra*, vacated an order freezing a defendant's assets (even though there, unlike here, they were claimed to be statutorily forfeitable) because the district court had failed to consider the possible need to exempt funds to pay counsel and support a family. The court recognized "defendant's need for living expenses and his right to the attorney of his choice," 801 F.2d at 1471, and held that "the government errs" in seeking to block "[e]xpenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel," *id.* at 1474-75. Judge Rubin, concurring, further emphasized that

> "I would require the Government to submit proof that the accused will not be left without adequate means to retain vigorous counsel and to provide basic sustenance for himself and his dependants." 801 F.2d at 1477.[8]

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[8] Petitioner here, a widower, was ordered not to return to his home in Belgium, was allowed no funds to live on, is not allowed to work in the United States, and was left with no funds to support his children, who are in Brussels. As a result they and he have subsisted on charity and gifts from relatives and friends for more than two years. A different panel of the Ninth Circuit had examined petitioner's financial statements and found that as a result of the continuing seizure of his property he was qualified to proceed *in forma pauperis*. Pp. 25a, 26a, *infra*.

Similarly, the Fourth Circuit in *Harvey, supra*, announced:

> "[W]e hold that to the extent the [Comprehensive Forfeiture] Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice. *Cf. United States v. Thier*, 801 F.2d 1463, 1477 (5th Cir. 1986) (Rubin, J., concurring specially) (Act violates substantive due process where all assets frozen)." 814 F.2d at 926.

Holding that such takings violate both the Fifth and Sixth Amendments, it approved several district court decisions in several circuits to the same effect.[9]

Under the law announced by the Fourth and Fifth Circuits, petitioner was and is entitled to return of his property in order to pay counsel, and indeed to continue with paid retained counsel in this Court. Petitioner was,

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[9] *E.g., United States* v. *Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985) (seizure of funds for bona fide attorneys' fees would "run afoul of the Sixth Amendment"); *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (if such seizure were allowed, "the prosecutor could exclude those defense counsel which he felt to be skilled adversaries"); see also *United States* v. *Nichols*, 654 F. Supp. 1541, 1559 (D. Utah 1987) ("Our system of justice simply cannot tolerate government actions that render defendants indigent and thus unable to employ counsel of choice"); *United States* v. *Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986) ("In my view, the most serious of the many effects of the forfeiture of attorney fees is that by tampering with the right to counsel, the statute undermines our traditional adversary system of justice. It places in the hands of the prosecution a tool capable of crippling its adversary."). Even what district court authority exists to the contrary rested on the assumption, indisputably negated here, that the assets seized were "the illgotten gains of criminal activity." *United States* v. *Draine*, 637 F. Supp. 482, 484 n.2 (S.D. Ala. 1986).

moreover, denied the kind of trial guaranteed by both the Fifth and Sixth Amendments because the taking away of his only funds made it impossible for him to undertake the heavy expenses of taking depositions abroad and calling witnesses from his home in Belgium for his defense.[10]

Interfering with an accused's most fundamental right to defend himself, by simply taking away all his assets—an interference the Government defended as based on "inherent authority"—is an utterly gross constitutional violation. As the District of Columbia Circuit through Judge MacKinnon observed:

> "the Sixth Amendment's protection of the right to the assistance of counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing. As the Supreme Court stated in *Powell v. Alabama*, 287 U.S. 45 . . . (1932), '[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.' 287 U.S. at 53 . . . . An accused who is financially able to retain counsel must not be deprived of the opportunity to do so." *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (footnote omitted).

That undersigned counsel continued to represent petitioner does not avoid the constitutional issue. Petitioner's assets, more than double the restitution amount, are still held. Moreover, the Fourth Circuit held in *Harvey*,

> "we reject any suggestion that by continuing their representation, counsel effectively mooted or waived derivatively any claim of denial of counsel of choice. Under the circumstances, counsel resolved an ethical

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[10] Five character witnesses traveled from Brussels to Los Angeles to testify for petitioner entirely at their own expense. Others did not. Although the court ordered that a Belgian witness whom petitioner wished to call be deposed in Brussels, petitioner was unable to do so because of the costs of multiple counsel for such a proceeding.

dilemma by remaining in the case at considerable financial risk, in order, among other things, to challenge the forfeiture provisions. We will not hold that this resolution made the constitutional claim, timely raised, no longer justiciable." 814 F.2d at 929 n.11.

The Ninth Circuit has not only failed to honor constitutional doctrine applied elsewhere; more importantly, it tolerates a continuing unconstitutional governmental deprivation of property that goes to the very integrity of this country's judicial system. The Fourth and Fifth Circuits have it right. The Ninth Circuit has it wrong. This Court should settle the matter, and assure that what happened to this petitioner can never happen to a defendant in a United States courtroom again.

B. Taking of Private Property Unrelated to Any Offense Exceeds Executive Power, Violates the Fourth and Fifth Amendments, and Conflicts with Decisions of This Court and of Three Other Circuits.

1. This Court's Most Basic Decisions Hold that Private Property May Not Be Seized and Retained Without Statutory Authority.

Even apart from the interference with criminal defense, it seems too clear for extended discussion that this Court's decisions do not countenance any such "inherent" governmental power to seize private property as was invoked here. The Court of Appeals acknowledged that

> "The stock certificates were not used as evidence, and nothing in the record indicates that they had any connection with the crimes committed or alleged. Indeed, the record shows that the certificates had remained dormant since 1973, well before the fraudulent scheme commenced." P. 22a n.6, *infra.*

The District Court's view was that none of that mattered:

> "THE COURT: . . . [K]nowing that there is a victim out there wanting part of that property, *do you think I am going to give it back to Van Cauwenberghe? Whether the government has an interest or not, I wouldn't do it.*" R. 286 (emphasis supplied).

And after the trial, although the stock certificates' adjudicated value of over $1 million far exceeded the ordered restitution of $493,000, the court still refused to free any part of those assets, explaining that "I am going to make case law." P. 31a, *infra*.

What the case law emphatically holds, however, is that in the absence of a valid statute, the Government has no "inherent" power to seize and retain private property. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Petitioner's property is a good deal more humble than a steel mill, but the constitutional principle is the same.

What the case law further holds is that the Fifth Amendment provides each person "the right to be free from unauthorized actions of government officials which substantially impair his property interests." *Greene* v. *McElroy*, 360 U.S. 474, 493 n.22 (1959). Not only does the Takings Clause of the Fifth Amendment prevent what happened here, but "[a]ny significant taking of property by the State is within the purview of the Due Process Clause." *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

To hold as the Ninth Circuit here did that because petitioner's current ownership of the stock is beneficial rather than titular, he therefore cannot assert a constitutional right to have that property released by the Government, borders on the ridiculous. The Ninth Circuit's view cannot be reconciled with any decision of this Court. On the contrary, this Court has held that "the types of interest protected as 'property' are varied and, as often as not, intangible, relating to 'the whole domain of social and economic fact.'" *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (citing many cases and quoting in part *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)); see also, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (right to

sue is a property interest). Countless court of appeals decisions recognize that even where there is a statute authorizing forfeiture, the right to seek recovery "extends to any person or party having a *legally recognized interest* in the [seized item], whether he is owner or lienholder, and whether that interest is legal or equitable in nature." *United States* v. *$364,960 in U.S. Currency*, 661 F.2d 319, 326 (5th Cir. Unit B 1981) (emphasis in original) (citing many cases and quoting *United States* v. *One 1961 Cadillac Hardtop Automobile*, 207 F. Supp. 693, 698 (E.D. Tenn. 1962)).

2. *The Court of Appeals' Refusal To Hear Petitioner's Fourth Amendment Claim Violates This Court's Holdings in* United States *v.* Salvucci *and* Rakas *v.* Illinois *and Conflicts with Holdings of the Fifth, Sixth and D.C. Circuits.*

In choosing to ignore petitioner's Fifth and Sixth Amendment claims for return of his property, the Ninth Circuit treated the constitutional issue as limited to the Fourth Amendment and Rule 41(e) of the Federal Rules of Criminal Procedure. But even as a matter only of Fourth Amendment law, the Ninth Circuit's denial of relief was totally at odds with clear decisions of this and other courts.

The Ninth Circuit acknowledged that "There is no dispute that Van Cauwenberghe was the rightful owner of the property at the time it was seized from his Swiss bank accounts." P. 21a, *infra*. And it acknowledged that "Van Cauwenberghe remains the beneficial owner of the assets and any proceeds derived from their sale." P. 4a, *infra*. In fact, the Court of Appeals did not even attempt to defend what the Government and the District Court had done here. It acknowledged that "the district court may have been under a duty to return property that neither was contraband nor had any evidentiary value." P. 22a, *infra*. Indeed it was. That duty is plain beyond dispute. *E.g.*, *United States* v. *Wil-*

son, 540 F.2d 1100, 1101 (D.C. Cir. 1976) ("We hold that the district court has both the jurisdiction and the duty to ensure the return of such property").[11]

In spite of this, the Ninth Circuit held that petitioner's constitutional claim would not be heard because control and titular record ownership had been transferred to his attorney and the prosecutor at the Court's direction in order to expedite sale, after the Court had ordered that the property would not be returned to petitioner and that petitioner would not be allowed to leave the United States until all the nearly $500,000 restitution had been paid. Pp. 29a-32a, *infra*. The Ninth Circuit threw out all of petitioner's constitutional claims because of the transfer of record title. It held that although he remained the

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[11] The illegality under the Fourth Amendment and the applicable extradition treaty of the initial unauthorized seizure and retention was undeniable, there being no warrant and not even a claim of probable cause. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978); *Warden* v. *Hayden*, 387 U.S. 294 (1967). That the initial warrantless seizure was effected through reluctant foreign authorities who the record established considered themselves "bound by the explanations provided by the United States Department of Justice," R. 93, does not alter the Fourth Amendment violation. *United States* v. *Mount*, 757 F.2d 1315 (D.C. Cir. 1985); *United States* v. *Morrow*, 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 155 (D.D.C. 1976).

After the trial, there was an additional obligation to return the seized property, as recognized in some of the very cases cited by the Court of Appeals. *Sovereign News Co.* v. *United States*, 690 F.2d 569 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), in fact distinguished the *King* case, on which the court here relied, and held that "Where the former defendant in criminal proceedings can show a property interest in the copies, the government must return them." 690 F.2d at 577. And *United States* v. *Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), held that "Property unlawfully seized must on motion be promptly returned . . . unless it be contraband or statutorily forfeit" and "Jurisdiction to return is not dependent upon whether the matter falls within the compass of Fed. R. Crim. P. 41(e)." 650 F.2d at 303 nn.26,27. See also *United States* v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979).

beneficial owner, "Van Cauwenberghe can no longer demonstrate that he is entitled to lawful possession of the property," and therefore, under the Court of Appeals' novel construction of the Fourth Amendment and Rule 41(e), Fed. R. Crim. P., he simply was out of luck, and the court would give him no relief. P. 22a, *infra*.

When petitioner in some astonishment sought rehearing, the Court of Appeals added a lengthy amendment to its opinion, pp. 1a-5a, *infra*, citing as authority for rejecting petitioner one of its decisions holding that a criminal defendant could not demand copies of transcriptions prepared by the Government of his telephone conversations. *United States* v. *King*, 528 F.2d 68 (9th Cir. 1975).[12]

This totally unprecedented holding—which was not briefed by the Government or mentioned at oral argument—not only ignores the Fifth and Sixth Amendment interests asserted, but flies in the face of this Court's repeated holdings that in motions to return illegally seized property, the Fourth Amendment is to be applied in a common-sense and non-technical way. The plain language of Rule 41(e) itself applies to "A person aggrieved by an unlawful search and seizure"—not limited, as the Ninth Circuit would have it, to one holding legal,

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[12] The court of appeals on rehearing also added for the first time, while disclaiming that "we express no view," that perhaps the assets were subject to an *ex parte* civil attachment in another case issued weeks after they had left the jurisdiction. However, the only cases the court cited all involved *perfected* attachments *by the Government* for taxes, and rested on the observation that, as one of them put it, "A defendant's motion for return of property will be unavailing where *the government* has a continuing interest in the property." *United States* v. *Francis*, 646 F.2d 251, 263 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981) (emphasis supplied). Moreover, the *ex parte* order from a civil case to which the court referred was a nullity under California law because of the pending proceeding, see Cal. Civ. P. Code § 488.475(b), and also because it was filed several weeks after the property in question had been taken out of the jurisdiction for sale; the order was never executed because no property remained in the jurisdiction to attach.

as opposed to beneficial, title. Moreover, this Court time and time again has warned that Fourth Amendment interests are not to be evaluated according to cramped compartments of property law. "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . . property rights are neither the beginning nor the end of this Court's inquiry." *United States* v. *Salvucci*, 448 U.S. 83, 91 (1980). "[A]rcane distinctions developed in property and tort law . . . ought not to control." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). "*Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980).

Not only is the Ninth Circuit's ducking of the issue impossible to square with those holdings of this Court. It is also in conflict with decisions in other circuits that have heard Fourth Amendment claims under the same federal rule where the technical property-law interests were far less plain than here. *E.g.*, *United States* v. *Haydel*, 649 F.2d 1152, 1154 (5th Cir. 1981) ("Haydel had a legitimate expectation of privacy for records secreted in his parents' home and under their bed"); *United States* v. *Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) (even after guilty plea, the court after trial "has both the jurisdiction and the duty to return the contested property here regardless and independently of the validity or invalidity of the underlying search and seizure"). The Constitution protects "any significant property interest." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971). If constitutionally guaranteed safeguards of property are to be disregarded as casually as the Ninth Circuit did here, in the face of this Court's decisions, then that unprecedented sophistry in itself calls for grant of certiorari.[13]

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[13] Any suggestion that petitioner intended to waive his constitutional rights is contradicted by the record. The order transferring custody, p. 33a, *infra*, was prepared at the District Court's direction

II. THE CIRCUITS ARE IN CONFLICT AS TO WHETHER AN EXTRADITED PERSON MAY CHALLENGE THE LEGALITY OF HIS EXTRADITION.

The issue whether an indicted defendant's assets can be seized without any legal authority is so fundamental that it nearly overshadows another ruling of the Court of Appeals here that by itself fully merits grant of certiorari to settle the law among the circuits and clarify what is tolerated in the administration of justice. The unresolved question is this: may an extradited person challenge jurisdiction after an extradition that is contrary to treaty?

The Second Circuit, applying this Court's seminal decision in *United States* v. *Rauscher*, 119 U.S. 407 (1886), follows the rule that it is a "rule of domestic law that the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty." *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.) (Friendly, J.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973); *accord*, *Fiocconi* v. *Attorney General*, 462 F.2d 475, 479 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972) ("[f]or the United States to try him for the unextraditable offense was thus a breach of the treaty"). The same rule is followed in the Eighth Circuit. *United States* v. *Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("The government's argument that Thirion lacked standing to complain of a vio-

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and agreed upon as to form, after the court had refused to return the property and directed over objection that it be placed in joint custody of petitioner's attorney and the prosecutor. See pp. 29a-32a, *infra*. Moreover, petitioner was (and is) being held hostage in the United States by the District Court as an additional way of enforcing its order. See pp. 24a, 36a, *infra*. "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (footnotes omitted), quoting *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

lation of the treaty is without merit"). The Eleventh Circuit also recognizes that "[u]*nless a defendant can . . . establish a treaty violation*, she or he may not object to trial in the United States." *Jaffe* v. *Smith*, 825 F.2d 304, 307 (11th Cir. 1987) (emphasis supplied). The same rule is followed in the Tenth Circuit. *United States* v. *Vreeken*, 603 F. Supp. 715, 717 (D. Utah 1984) ("the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty"), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 955 (1987).

The Ninth Circuit here, however, held exactly the opposite. Even though the record showed a treaty violation without dispute—the highest U.S. authorities had acknowledged that this treaty did not cover these offenses, pp. 39a-42a, *infra*, and there was also uncontroverted evidence that U.S. prosecutors had actively misled the Swiss as to the nature of the offenses charged [14]—nevertheless the Ninth Circuit held that petitioner would not be heard to complain. It held:

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[14] U.S. prosecutors told the Swiss authorities that extradition was based on "[f]raud and related offenses by Article II(6) of the treaty." R. 140. They (inaccurately) stated in writing to the Swiss authorities that "the offense of fraud, in violation of Title 18, United States Code, Sections 1343, is committed when the offender *induces another person to give up something of value* in *reliance* upon statements that the offender makes, knowing them to be untrue, and uses the United States mails in the process," R. 142 (emphasis supplied), and that "the indictment in the United States charges Wilfried VAN CAUWENBERGHE with an act of fraud in Los Angeles, California," R. 143, and that after extradition he would "face trial on charges of fraud," R. 41. At the same time, the prosecutors were filing pretrial papers in the U.S. District Court in Los Angeles that (accurately) stated that wire fraud "is not limited to the common-law definition of false pretenses," R. 128, and that the offense "requires only a 'scheme to defraud' and *not the success of the fraud*," and that "it is *not incumbent upon the Government to allege or prove actual reliance by or injury* to the victim," R. 134 (emphasis supplied).

> "We therefore defer to the Swiss Federal Tribunal's decision as to Van Cauwenberghe's extraditability under the Treaty . . . ." P. 14a, *infra*.

The Third Circuit has taken the same view as the Ninth, so there is a basic disagreement among the courts of appeals. *McGann* v. *U.S. Board of Parole*, 488 F.2d 39 (3d Cir. 1973), *cert. denied*, 416 U.S. 958 (1974).

The Ninth Circuit's position that a defendant will not be heard to assert such a defense in a U.S. court—a defense based a treaty which as a matter of "domestic law," *Shapiro* v. *Ferrandina*, *supra*, is the law of this land—was long ago rejected by this Court. In *United States* v. *Rauscher*, *supra*, this Court through Mr. Justice Miller held that a defendant extradited to the United States under a treaty *can* challenge under the treaty whether the offense he is to be tried for is an extraditable one. He "can only be tried for one of the offences described in that treaty." 119 U.S. at 430.[15] *Rauscher* has been the leading extradition case ever since, and often followed. *E.g.*, *Cook* v. *United States*, 288 U.S. 102, 121-22 (1933) (Brandeis, J.).

The Ninth Circuit's opinion here failed even to acknowledge the existence of *Rauscher* and the cases from other circuits following it—even though these were repeatedly urged by petitioner in briefs, oral argument, and again in petition for rehearing. The court of appeals confined its discussion to *Johnson* v. *Browne*, 205 U.S. 309 (1907), which it concluded—while conceding that the language on which it relied could be read otherwise—"precludes any review of the . . . [foreign] court's decision as to the extraditable nature of the offense." P.

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[15] The same is not true for a defendant brought to this country not under a treaty but by extra-legal force; but as Mr. Justice Miller distinguished the two cases in *Ker* v. *Illinois*, 119 U.S. 436 (1886), decided the same day as *Rauscher*, if a defendant is brought here by treaty, then he "came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him." 119 U.S. at 443.

14a, *infra*, quoting *McGann*, *supra*. Yet *Johnson* v. *Browne* explicitly followed *Rauscher*, and affirmed the release on *habeas corpus* of an extradited defendant convicted of an offense not covered in the applicable extradition treaty. This Court there explained:

> "Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty . . . ." 205 U.S. at 317.

The issue could not be framed more sharply than in this case, because the record here contains documents in which both the Attorney General and the Secretary of State acknowledged that the 1900 extradition treaty with Switzerland does not cover these offenses. See pp. 39a-42a, *infra*.[16] Review is particularly appropriate because the documentary record here also establishes that U.S. authorities repeatedly misled the Swiss by asserting that the offense for which petitioner was being sought was not the peculiar U.S. offense called wire fraud (which U.S. lawyers know requires only a scheme plus a wire trans-

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[16] The treaty allows extradition for "false pretences." See p. 48a, *infra*. Wire fraud, which is always recognized as an offense *in pari materia* with mail fraud, 18 U.S.C. § 1341, see, *e.g.*, *United States* v. *Gimbel*, No. 86-1808, —— F.2d —— (7th Cir. 1987), "is not to be confounded with the offense of obtaining money under false pretenses." *Schwartzberg* v. *United States*, 241 F.2d 348, 352 (2d Cir. 1917). Likewise, "it is evident that section 2314 cannot be properly interpreted to limit its application to the ancient statutory crime of obtaining property by false pretenses." *United States* v. *Benson*, 548 F.2d 42, 46 (2d Cir.), *cert. denied*, 430 U.S. 910 (1977). See also U.S. ATTORNEYS' MANUAL, § 9-15.220 (1977): "Many federal offenses are based upon the commerce clause of the constitution. Regrettably these offenses are not extraditable under most treaties. For example, the gravamen of a violation of 18 U.S.C. § 2314 is interstate transportation, not theft." The State and Justice Departments have been negotiating with Switzerland for at least six years in an unsuccessful effort to obtain a new treaty that would cover the offenses charged here. See ATTORNEY GENERAL OF THE U.S., ANNUAL REPORT 1982, 84.

mission),[17] but rather was "fraud." [18] The record also shows that at one point Swiss officials replied to a U.S. Justice Department request, "We are sorry but we really cannot, in this matter, put any more pressure on the Swiss Federal Tribunal." R. 42.[19]

This Court has not heard argument in a case involving international extradition since 1936. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5 (1936). But that is not because international extradition has become less important. Rather, as Department of Justice officials have testified to the Congress, the number of cases involving international extradition has steadily increased, as individuals have become more mobile and international travel commonplace.[20] The lower courts have been left to interpret as best they can for modern international law enforcement the ambiguities and unanswered questions in this Court's extradition cases that date from around the turn of the Twentieth Century. The Ninth Circuit's opinion here, for instance, concluded that *Johnson* v. *Browne* can be read two ways—its, or petitioner's and the Second, Eighth, Tenth and Eleventh Circuits'. Petitioner's liberty and property depended on which was chosen.

Leaving such questions unanswered has not helped the administration of justice. Not only the courts, but enforcement officials as well have been left at large without clear limits. Some, as here, have overstepped. As a result, concern has been expressed more and more often about corners being cut by U.S. officials in order to obtain extradition. Professor Alona Evans, former President of the American Society of International Law,

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[17] See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

[18] See note 14, *supra*.

[19] After, pursuant to court order, petitioner's counsel obtained copies of the documents referred to above, and while others remained unproduced, the District Court cut off any further discovery of documents relating to the extradition.

[20] See Hearings on H.R. 2643 Before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives 34 (1983).

warned of "a 'frame of mind' in operating officials" handling extradition matters "whose zeal gets the better of their judgment." Evans, *Acquisition of Custody Over the International Fugitive Offender*, 1964 BRITISH YB. OF INTL. LAW 77, 102, 103. And a former State Department extradition official recently exploded what he called the widespread assumption "that the United States will not request extradition . . . when the pertinent extradition treaty does not cover the facts of the specific case;" he explains that "This may have been true in the past, but it is no longer accurate," and U.S. extradition officials now often use "extra-legal methods." Blakesley, *Extradition Between France and the United States*, 13 VAND. J. TRANSNATL. L. 653, 661, 680-81 (1980). It is past time for this Court to resolve the basic and frequently arising question whether U.S. courts in criminal proceedings are to apply the applicable extradition treaty, and also whether prosecutorial misrepresentations to obtain extradition will be tolerated.

III. AWARD OF RESTITUTION TO A NON-VICTIM CONFLICTS WITH DECISIONS OF THE FIRST, SECOND, THIRD, FIFTH, EIGHTH AND ELEVENTH CIRCUITS.

This extraordinary case creates another very sharp and simple conflict in the circuits as to a basic issue of criminal restitution law. The Ninth Circuit here approved a sentence under 18 U.S.C. § 3651, the federal probation statute, that required petitioner to pay over $458,000 to Roger Vanden Stock, a Belgian who had been allowed to testify for the Government at trial, even though as both courts below recognized the trial was limited to two counts alleging wire transfers and travel involving one Roger Biard. This was made even though (1) there had been no trial of the counts involving wires or travel related to Vanden Stock, and (2) the trial testimony—including Vanden Stock's own—established without dispute that Vanden Stock himself was only a witness and had not lost any money.

The Court of Appeals held that the order was proper because the overall scheme alleged in the two Biard counts included "the Vanden Stock family" as well, even though the jury was instructed that for conviction it need find only acts with respect to Biard. As for the uncontroverted fact that Vanden Stock himself concededly was not a victim, once again, as with so many of the troubling issues in this case, the Court of Appeals simply passed the issue by in silence.

Six circuits have held that restitution under § 3651 may not be awarded on untried counts, and certainly not to a person who is not a victim. District court orders that do so are consistently reversed. See *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983) ("The order can require restitution only to the damaged party"); *United States* v. *Haile*, 795 F.2d 489 (5th Cir. 1986); *United States* v. *Forzese*, 756 F.2d 217 (1st Cir. 1985); *United States* v. *John Scher Presents, Inc.*, 746 F.2d 959 (3d Cir. 1984); *United States* v. *Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984) (*en banc*); *Fiore* v. *United States*, 696 F.2d 205 (2d Cir. 1982). These courts of appeals have consistently commented that "the [Probation] Act has been read narrowly by all the circuit courts that have addressed the question . . ." *United States* v. *Haile*, *supra*, 795 F.2d at 491. See also *United States* v. *John Scher Presents, Inc.*, *supra*, 746 F.2d at 963 ("The courts have uniformly construed this language narrowly"); *United States* v. *Missouri Valley Constr. Co.*, *supra*, 741 F.2d at 1548 (referring to "[t]he strictness with which the courts have consistently applied the monetary-payment provisions of section 3651").

Without that careful construction, restitution orders can easily be abused. Here the good sense of the decisions of these other circuits is particularly manifest—because as soon as the restitution order had been issued for the benefit of Roger Vanden Stock, the corporation his father owned, which was the only entity losing money, promptly brought a civil suit against petitioner to recover the same

funds.[21] This Court should settle which rule—that of those six circuits, or of the Ninth Circuit here—is correct.

IV. ORDERING AN ALIEN TO REMAIN IN THE UNITED STATES, AFTER A FINDING THAT TO DO SO SERVES NO PROBATIONARY PURPOSE, VIOLATES THIS COURT'S HOLDINGS UNDER THE FIFTH AND EIGHTH AMENDMENTS.

Petitioner completed a one-year prison sentence, but is not allowed to go home. On the first remand (by the other Circuit Judges, who constituted the motions panel), the District Court entered specific findings that by the transfer of custody of the stock petitioner had assured availability of sufficient property to pay the restitution in due course, and that "no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States." P. 38a, *infra*. Nevertheless it kept him here. Then, instead of granting relief, the Court of Appeals passed over petitioner's legal arguments in total silence, and just remanded, saying only that the requirement he remain in the United States should be reconsidered and "may be modified." P. 24a, *infra*. The District Court on remand reconsidered—but while not altering its previous findings in any respect, it granted no relief. It noted that the assets had not yet been fully liquidated and therefore the restitution not yet paid, and so it left the exile order standing.

This order of exile is not only cruel, but unusual in the most literal modern sense, and is unlawful under this Court's decisions. First, it amounts to "banishment, a fate universally decried by civilized people." *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion). Second, in *Bearden* v. *Georgia*, 461 U.S. 660 (1983), this

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[21] *Brasserie Belle-Vue, S.A.* v. *Blair, et al.*, No. CV 86-1719-JSL (C.D. Cal. 1986). The Court of Appeals described the charge as that petitioner "participated with two Americans in a scheme to defraud Roger Biard, a Belgian investment broker, *and a Belgian corporation*." P. 7a, *infra* (emphasis supplied).

Court held that as a matter of due process of law, a defendant's liberty may not be restricted simply because he is unable to pay restitution or a fine. In the record here are specific findings that petitioner can do no more than he already has. Pp. 26a, 37a-38a, *infra*. Third, many circuits have held that a condition of probation must "have a reasonable relationship to the treatment of the accused and the protection of the public." *Porth* v. *Templar*, 453 F.2d 330, 333 (10th Cir. 1971). Here the record contains a finding that the condition of probation under which petitioner after a year in prison is still being kept away from his home and children serves "no further probationary purpose." P. 38a, *infra*. It thus is, by definition, an "unnecessary" and therefore unlawful punishment. *Wilkerson* v. *Utah*, 9 Otto 130, 136 (1879). It also violates 8 U.S.C. §§ 1251(a)(4) and 1252(h), which provide that after prison an alien shall be deported, not held on probation. Yet the Ninth Circuit once again refused to address the legal issue and gave no relief. Under the law applied everywhere else, petitioner is entitled to go home, not as a matter of grace or discretion, but as a matter of legal right.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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October 30, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

D.C. No. CR-84-963-AAH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

Argued and Submitted
February 5, 1987—Pasadena, California

Filed April 10, 1987
Amended September 3, 1987

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, Senior District Judge, Presiding

ORDER AND AMENDED OPINION

COUNSEL

Robert L. Brosio, Los Angeles, California, and John D. Arterberry, Stephen J. Shine, Ellyn Marcus Lindsay, Washington, D.C., for the plaintiff-appellee.

John G. Kester, Robert S. Litt, Washington, D.C., for the defendant-appellant.

Before NELSON and BEEZER, Circuit Judges, and LEAVY,* District Judge.

ORDER

The opinion filed April 10, 1987 and published at 814 F.2d 1329 is amended as indicated below.

1. On p. 1337, col. b, first paragraph (Slip op. page 16, first paragraph), delete the sentence beginning "Furthermore, ..." Insert immediately afterward the following paragraph:

> This conclusion is consistent with our holding in *United States v. Vigil*, 561 F.2d 1316 (9th Cir. 1977) (per curiam). In *Vigil*, we held that the district court should have severed trial to allow a defendant to obtain certain exculpatory evidence from a co-defendant witnesses who could not be compelled to testify in a joint trial because of the privilege against self-incrimination. *Id.* at 1317-18. Van Cauwenberghe asserts that the *Vigil* rule is invoked in his case because a foreign witness beyond the court's subpoena power refused to testify unless trial was severed. We do not read *Vigil* as conferring on foreign witnesses a blanket power to dictate whether trials should be severed, regardless of whether the witness could properly assert an evidentiary privilege.

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* Honorable Edward Leavy, United States District Judge, District of Oregon, sitting by designation.

2. On p. 1339 (Slip op. page 19 after 41(e), following line 8, insert the paragraphs:

Van Cauwenberghe argues that the transfer of property was not made voluntarily, but was made at the order and direction of the district court. He contends that under these circumstances he should not be deemed to have waived his challenges to the legality of the seizure. We have considerable difficulty accepting the predicate of this argument. First, the record below shows that Van Cauwenberghe sought and willingly complied with the order, filed on January 23, 1986 after the district court entered the guilty verdict, in order that he be permitted to leave the country and return to Belgium. Under the terms of his probation, the district court required Van Cauwenberghe to remain in this country until he satisfied his restitutionary obligation. The order itself declares that counsel for Van Cauwenberghe and the government "jointly submit the foregoing proposed order and request approval by the Court." Order, Jan. 23, 1986, at 2.

Second, while Van Cauwenberghe's appeal was pending, he lodged an emergency motion in this court in which he argued strenuously that he should be permitted to return to Belgium (which does not extradite its nationals) because he had irrevocably transferred full title to the assets to his attorney and the government's counsel for liquidation to satisfy his restitutionary obligations. The motions panel remanded to the district court for further findings to ensure that an irrevocable transfer had in fact occurred and that the assets would cover his restitutionary obligation. The district court made such findings and concluded that, since the assets were sufficient, the defendant could return home. It thus comes as something of a surprise that, after the avowals in his affidavit accompanying the emergency

motion, in his petition for rehearing the defendant is still claiming entitlement to lawful possession of the assets.

In light of these circumstances, the record does not support Van Cauwenberghe's contention that he did not transfer title to the assets voluntarily. Absent a showing that the individual requesting return of property under Rule 41(e) is entitled to its lawful possession, the property may not be released to him. Fed. R. Crim. P. 41(e); *see United States* v. *King*, 528 F.2d 68, 69 (9th Cir. 1975) (per curiam). Although Van Cauwenberghe remains the beneficial owner of the assets and any proceeds derived from their sale, he has not demonstrated entitlement to lawful possession of the assets. Return of the assets under Rule 41(e) is therefore inappropriate.

Even if we were to conclude that Van Cauwenberghe could substantiate his claim of lawful possession, we believe that we would reach the same result. Assuming that the property was illegally seized under the treaty and the fourth amendment, return of the property might nonetheless be barred by the existence of a civil writ of attachment filed against the property. *See United States v. Francis*, 646 F.2d 251, 263 (6th Cir.) (denying return of illegally seized property where state tax lien had been placed on the property), *cert. denied*, 454 U.S. 1082 (1981); *United States v. Freedman*, 444 F.2d 1387, 1388 (9th Cir. 1971) (denying return of illegally seized property because of pending IRS lien); *Guerra v. United States*, 645 F. Supp. 775, 779-80 (C.D. Cal. 1986) (same). However, because of our holding above, we express no view on whether the seizure was illegal or whether the property would have been returnable to Van Cauwenberghe despite the civil writ of attachment. We do not hold that Van Cauwenberghe lacks standing to challenge the

legality of the seizure; rather, resolution of that question is unnecessary to the disposition of his Rule 41(e) challenge on appeal.

The opinion having been thus modified, the petition for rehearing is otherwise DENIED.

The full court was advised of the suggestion for en banc rehearing and no active judge of the court requested a vote on it. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is REJECTED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

USDC No. CR-84-963-AAH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

Argued and Submitted
February 5, 1987—Pasadena, California

Filed April 10, 1987

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, Senior District Judge, Presiding

OPINION

COUNSEL

Robert L. Brosio, Los Angeles, California, and John D. Arterberry, Stephen J. Shine, Ellyn Marcus Lindsay, Washington, D.C., for the plaintiff-appellee.

John G. Kester, Robert S. Litt, Washington, D.C., for the defendant-appellant.

Before NELSON and BEEZER, Circuit Judges, and LEAVY,* District Judge.

NELSON, Circuit Judge:

Wilfried Van Cauwenberghe, a citizen of Belgium, appeals from a criminal conviction on one count of wire fraud under 18 U.S.C. § 1343 (1982) and one count of interstate transportation of a victim of fraud under 18 U.S.C. § 2314 (1982). Following a jury trial, Van Cauwenberghe was convicted of participating with two Americans in a scheme to defraud a Belgian investment broker and a family-owned Belgian corporation of 3.6 million dollars relating to the purchase and development of a condominium tract near Kansas City. Van Cauwenberghe argues that numerous errors were made requiring reversal of his extradition from Switzerland, his indictment, and his trial. In addition, Van Cauwenberghe argues that the district court should have returned certain property to him because it was seized illegally, and that his sentence was improper. This court has jurisdiction under 28 U.S.C. § 1291. We affirm.

FACTS

Between 1979 and 1981, Van Cauwenberghe participated with two Americans, Alan H. Blair and Gerald L. Bilton, in a scheme to defraud Roger Biard, a Belgian investment broker, and a Belgian corporation owned by members of the Vanden Stock family, of 3.6 million dollars relating to the purchase and development of Concorde Bridge Townhouses, an apartment complex near Kansas City, Missouri. Van Cauwenberghe, Blair, and Bilton were indicted on seven counts, including three

* Although the Honorable Edward Leavy was sitting by designation at the time this case was argued and submitted, Judge Leavy became a member of this court prior to the filing of this decision.

counts of wire fraud (18 U.S.C. § 1343), three counts of interstate transportation of a victim of fraud (18 U.S.C. § 2314), and one count of conspiracy to commit fraud (18 U.S.C. § 371), in October 1984. The government learned that Van Cauwenberghe, a Belgian citizen, would be traveling from Brussels to Geneva on a brief business trip and, on November 20, 1984, filed a provisional arrest request with Swiss authorities pursuant to Article VI of the Treaty on Extradition, May 14, 1900, United States-Switzerland, 31 Stat. 1928, T.S. No. 354 ("Treaty").[1] Van Cauwenberghe was arrested by Swiss authorities as he stepped off his plane in Geneva on January 14, 1985.

On January 15, 1985, Swiss authorities also seized Van Cauwenberghe's assets at Credit Suisse and Fides Societe Fiduciare, Geneva, pursuant to the government's request under Article XII of the Treaty. These assets consisted of two stock certificates dating from 1973 in ABAMAR and BATIMAR, Panamanian land-holding corporations in which Van Cauwenberghe held 6.293% and 19.659% interests, respectively, and eighty-two unrelated documents. Van Cauwenberghe's Swiss attorney made a showing that Van Cauwenberghe had not invested any money in ABAMAR or BATIMAR since 1973, at least six years before the allegedly fraudulent acts for which he was being held. As a result, Swiss authorities agreed to release the BATIMAR certificate on February 7, 1985. The government, however, renewed its request that all stock certificates in Van Cauwenberghe's Swiss accounts be seized, and, on March 21, 1985, Swiss authorities acquiesced and again seized the BATIMAR certificate. The government subsequently filed a formal extradition request on March 12, 1985.

Van Cauwenberghe challenged his extradition before the Swiss courts including the Swiss Federal Tribunal,

[1] The government could not proceed against Van Cauwenberghe in Belgium because Belgium does not extradite its nationals.

Switzerland's highest court, which, on September 25, 1985, held that Van Cauwenberghe was extraditable under the Treaty for all of the offenses charged except conspiracy. Accordingly, Van Cauwenberghe was extradited to the United States on September 26, 1985.

The trial of Van Cauwenberghe, Blair, and Bilton began in Los Angeles on November 19, 1985. Prior to trial, the district court denied Van Cauwenberghe's motion for a severance and limited trial to counts one (interstate transportation of a victim of fraud) and two (wire fraud) (the "Biard counts"),[2] severing counts three through six (the "Vanden Stock counts") for later disposition, and dismissing count seven (conspiracy). The district court also denied Van Cauwenberghe's motions to dismiss the indictment due to improper extradition, to dismiss count two for failure to state an interstate offense, and for transfer of venue to Washington, D.C. In addition, the district court denied Van Cauwenberghe's motion under Fed. R. Crim. P. 41(e) to release his stock certificates in ABAMAR and BATIMAR, and ordered all property seized by Swiss authorities deposited into the registry of the court pending the outcome of the trial.

The theory of Van Cauwenberghe's defense at trial was that he was merely an innocent pawn in the fraudulent scheme, not a culpable participant. During trial, Roger Vanden Stock, a director of the family-owned Belgian corporation, was allowed to testify about com-

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[2] The indictment alleged a scheme to defraud both Roger Biard and the Vanden Stock family and broke down into seven counts:

Count I	—	18 U.S.C. § 2314 (Biard)
Count II	—	18 U.S.C. § 1343 (Biard)
Count III	—	18 U.S.C. § 2314 (Vanden Stock)
Count IV	—	18 U.S.C. § 2314 (Vanden Stock)
Count V	—	18 U.S.C. § 1343 (Vanden Stock)
Count VI	—	18 U.S.C. § 1343 (Vanden Stock)
Count VII	—	18 U.S.C. § 371 (Biard & Vanden Stock)

munications between the Vanden Stock family and defendants, over Van Cauwenberghe's objections that such testimony was unduly prejudicial and improper because trial was limited to the two Biard counts. The court also allowed extensive testimony, over Van Cauwenberghe's objections, regarding Blair's misrepresentations to both Biard and the Vanden Stocks made outside the presence of Van Cauwenberghe.

The jury found all three defendants guilty on both counts. Van Cauwenberghe's motions for judgment of acquittal and for a new trial were denied, and judgment for the government was entered on January 22, 1986. On motions by the government, the district court dismissed the Vanden Stock counts against all defendants and agreed to retain the stock certificates until sentencing. The district court sentenced Van Cauwenberghe to a $10,000 fine and one year and one day in custody on the first count, crediting him for 373 days already served in pretrial confinement, and to a $1,000 fine and a five-year probation on the second count. As conditions of probation on count two, the district court ordered Van Cauwenberghe (1) to make restitution of $458,373.89 to Roger Vanden Stock and $34,501.26 to Roger Biard; (2) not to engage in any real estate transactions, except to liquidate his property, or wire transfers, except to his family; and (3) not to leave the United States until the restitution is paid.[3]

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[3] Upon Van Cauwenberghe's emergency motion to modify the conditions of his probation so as to allow him to travel to his home in Belgium, a panel of this court ordered a limited remand to the district court on December 31, 1986. On February 17, 1987, the district court entered an order in which it found that (1) Van Cauwenberghe has relinquished sufficient property to pay the restitution in due course; (2) Van Cauwenberghe has irrevocably transferred full title to the property so that he cannot regain control over it if allowed to return to Belgium; and (3) there is no further probationary purpose to be served by requiring Van Cauwenberghe to remain in the United States.

Because the 373 days of pretrial confinement for which Van Cauwenberghe received credit exceeded his custodial sentence on count one, Van Cauwenberghe immediately began his probation. The stock certificates were released into the joint custody of the government and Van Cauwenberghe for liquidation. The amount realized upon liquidation was ordered to be deposited back into the registry of the district court. The excess, up to $600,000 above the $492,875.15 restitution, realizable upon the eventual sale of the certificates, was attached on February 6, 1986, pursuant to a civil action filed by Biard against Van Cauwenberghe in the district court.

Van Cauwenberghe timely appealed on January 31, 1986. Neither Blair nor Bilton, co-defendants below, is a party to this appeal.

DISCUSSION

I. EXTRADITION

The district court's decision that an offense is an extraditable crime presents a legal question subject to de novo review by this court. *Quinn v. Robinson*, 783 F.2d 776, 791-92 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986).

The right "to demand and obtain extradition of an accused criminal is created by treaty." *Id.* at 782; *see Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). The offense complained of must ordinarily, therefore, be listed as an extraditable crime in the treaty. *Quinn*, 783 F.2d at 791. In addition, "under the doctrine of 'dual criminality,' an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations." *Id.* at 783; *In re Extradition of Russell*, 789 F.2d 801, 803 (9th Cir. 1986). This dual criminality requirement has been expressly incorporated into the Treaty. *See* Treaty, art. II, 31 Stat. at 1929,

T.S. No. 354, at 2. To satisfy this "dual criminality" requirement,

> "[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."

Russell, 789 F.2d at 803 (quoting *Collins v. Loisel*, 259 U.S. 309, 312 (1922)).

As a matter of international comity, "[t]he doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite." *Quinn*, 783 F.2d at 783. However, since the doctrine is based on comity, its "protection exists only to the extent that the surrendering country wishes." *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), *cert. denied*, 107 S. Ct. 652 (1986). Therefore, the " 'extradited party may be tried for a crime other than that for which he was surrendered *if the asylum country consents.*' " *Id.* (quoting *Berenguer v. Vance*, 473 F.Supp. 1195, 1197 (D.D.C. 1979)); *see* M. Bassiouni, *International Extradition* ch. VII, at 6-11 (1983).

Van Cauwenberghe argues that his extradition was improper because the Treaty does not identify wire fraud and interstate transportation of a victim of fraud as extraditable offenses. The Treaty does not expressly name these specific offenses but includes "obtaining money or other property by false pretenses [and] receiving money . . . knowing the same to have been . . . fraudulently obtained." Treaty, art. II(6), 31 Stat. at 1930, T.S. No. 354, at 3. Moreover, the government insists that Van Cauwenberghe's argument is foreclosed by the Swiss Federal Tribunal's decision because "determination of whether a crime is within the provisions of

an extradition treaty is within the sole purview of the requested state," citing *Johnson v. Browne*, 205 U.S. 309, 316 (1907), and *McGann v. U.S. Bd. of Parole*, 488 F.2d 39, 40 (3d Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 958 (1974). We agree.

Johnson involved an extradition request by the United States to Canada. The Canadian government determined that one of the offenses for which extradition was sought, conspiring to defraud the government, was not a form of fraud provided for in the subdivision of the article of the treaty listing extraditable fraud offenses. *Johnson*, 205 U.S. at 312. The Supreme Court held that "[w]hether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself." *Id.* at 316 (citing to Article II of the treaty). Article II of the treaty in *Johnson* dealt only with offenses of a political character and expressly stated that "[i]f any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final." *Id.* at 319 n.1.

Because of this language in the *Johnson* treaty, Van Cauwenberghe argues that the holding in *Johnson* should be read narrowly. We believe, however, that the *Johnson* holding need not be read narrowly and that the first half of the sentence makes a broader statement regarding the proper deference to be accorded a surrendering country's decision on extraditability. The Canadian government's decision was not that the offense was non-extraditable because it was of a political character, a position that might have justified a narrower reading of *Johnson*. Instead, it maintained that the offense did not fall within the treaty's category of extraditable fraud offenses. *Id.* at 312. Thus, we believe that the first half of the sentence addressed the proper deference to be

accorded a surrendering country's decision as to whether a particular offense comes within a treaty's extradition provision.

In *McGann*, the Third Circuit also construed *Johnson* broadly. *McGann* involved the properiety of an extradition from Jamaica in which the Jamaican court held a parole violater extraditable under its treaty with the United States. The *McGann* court found the *Johnson* language controlling: "The holding of Johnson v. Browne . . . precludes any review of the Jamaican court's decision as to the extraditable nature of the offense . . . ." *McGann*, 488 F.2d at 40. We agree with the Third Circuit's reading of *Johnson*. According deference to the surrendering country's decision as to extraditability already underlies the related "doctrine of specialty." It would render that doctrine practically meaningless to hold that courts cannot try an extradited party for offenses other than those for which the surrendering government agreed to extradite, but need not defer to the surrendering government's threshold decision as to whether an offense is extraditable.

We therefore defer to the Swiss Federal Tribunal's decision as to Van Cauwenberghe's extraditability under the Treaty and hold that Van Cauwenberghe was properly extradited.

II. THE INDICTMENT

Van Cauwenberghe argues that count two of his indictment should have been dismissed because it was self-contradictory and failed to state an offense. Count two of Van Cauwenberghe's original indictment incorporates the allegations in count one relating to the fraudulent scheme and states:

> 2. On or about December 6, 1979, within the Central District of California, the defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED

> [sic] VAN CAUWENBERGHE, for the purpose of executing the aforesaid scheme and artifice, did cause to be transmitted in interstate commerce, signs, signals, and sounds by means of wire communications, that is, a telex between Geneva, Switzerland, and Los Angeles, California, directing the transfer of $1 million fraudulently obtained from Roger Biard to an account in the name of Hexagonal Valley, N.V., at Manufacturer's Bank, Los Angeles, California.

Van Cauwenberghe argues that this count is self-contradictory because such a telex would be *only* in foreign commerce, citing *Wentz v. United States*, 244 F.2d 172, 175 (9th Cir.), *cert. denied*, 355 U.S. 806 (1957). We disagree.

In *Wentz*, an indictment charging a telex transmission "by means of interstate and foreign wire" expressly stated its origin in Los Angeles and the path of its transmission through Dallas and San Antonio, Texas, to Mexico City, Mexico. *Id.* at 173. The wire fraud statute in force when the indictment was issued (an early version of 18 U.S.C. § 1343) proscribed only transmissions by interstate wire. *Id.* at 174. Because the telex originated in Los Angeles and terminated in Mexico City, defendants insisted that this was solely foreign commerce, relying on *Border Pipe Line Co. v. Federal Power Commission*, 171 F.2d 149 (D.C. Cir. 1948). We held, however, that the telex was transmitted in interstate commerce under the wire fraud statute because its path included the interstate transmission from Los Angeles to Dallas. *Wentz*, 244 F.2d at 176. With respect to *Border Pipe*, we stated that "we do not read that case as reaching the question that would have arisen if the gas had flowed from Texas to New Mexico and thence across to Mexico." *Id.*

In our case, evidence at trial demonstrated that the telex between Geneva and Los Angeles which formed the

basis of count two actually followed a path consisting of three transmissions: (1) a foreign transmission from Geneva to New York City; (2) an intra-city transmission across New York City; and (3) an interstate transmission from New York City to Los Angeles. Thus, like the path of the telex in *Wentz*, the path of this telex also included an interstate transmission. This was not, therefore, "a foreign transmission without an interstate aspect," *id.* at 175, as alleged by Van Cauwenberghe. The only relevant difference between *Wentz* and our case is that in *Wentz* the path of the telex was expressly described in the indictment and labeled a transmission in interstate *and* foreign commerce, whereas here only the origin and end of the telex were described and only interstate commerce was indicated.

Van Cauwenberghe argues that the differences in description and labeling are determinative. However,

> an indictment is not to be read in a technical manner, but is to be construed according to common sense with an appreciation of existing realities. It must be read to include facts which are necessarily implied by the allegations made therein. Even if an essential averment in an indictment is faulty in form, if it may by fair construction be found within the text, it is sufficient.

United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.) (citations omitted), *cert. denied*, 429 U.S. 839 (1976). The existing reality is that the telex that formed the basis for count two while originating in Geneva and terminating in Los Angeles, actually included a transmission in interstate commerce precisely as charged in the indictment. Therefore, Van Cauwenberghe's argument that the telex described in count two could only be in foreign commerce is incorrect.

Since Van Cauwenberghe was tried and convicted for a telex that was transmitted in interstate commerce as

charged, this is not a case in which Van Cauwenberghe was convicted "based on an offense that is different from that alleged in the grand jury's indictment." *United States v. Miller*, 471 U.S. 130, 142 (1985). This is also not a case, as alleged by Van Cauwenberghe, in which the indictment was altered by the district court. The district court correctly instructed the jury that count two stated a transmission that touched both foreign and interstate commerce and that it could base a finding of guilty under either theory. Therefore, count two of the indictment properly stated an offense for which Van Cauwenberghe was tried and convicted.

III. ALLEGED ERRORS AT TRIAL

We review the district court's decisions with respect to severance and admissibility of evidence under an abuse of discretion standard. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986); *United States v. Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983). We will not reverse for an abuse of discretion unless we have "a definite and firm conviction that the court below committed an error." *Maddox*, 792 F.2d at 1412.

A. SEVERANCE

Ordinarily, "defendants jointly charged are to be jointly tried." *Ramirez*, 710 F.2d at 545; *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980). "Whether severance is necessary is within the sound discretion of the district court." *Ramirez*, 710 F.2d at 545; *United States v. Gee*, 695 F.2d 1165, 1169 (9th Cir. 1983). A trial judge may order a severance if it appears that a defendant may be significantly prejudiced by a joint trial with his codefendants. *See Escalante*, 637 F.2d at 1201.

In order to prove that the district court abused its discretion in denying a motion for severance, the moving

party must show that joint trial was "'so prejudicial that the trial judge could exercise his discretion in only one way.'" *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (quoting *Escalante*, 637 F.2d at 1201). "'The party seeking reversal of a decision denying severance . . . has the burden of proving "clear," "manifest," or "undue" prejudice from the joint trial. The defendant must prove that the prejudice was of such magnitude that he was denied a fair trial.'" *Id.* (quoting *Escalante*, 637 F.2d at 1201 (citations omitted).

Van Cauwenberghe argues that the district court's denial of his motion for severance denied him a fair trial because (1) he was unable to obtain exculpatory testimony from Monique Mat, wife of co-defendant Blair and (2) joint trial with Blair allowed the Government to introduce into evidence statements by Blair that would have been inadmissible against Van Cauwenberghe in a separate trial. We disagree.

First, Van Cauwenberghe insists that Monique Mat would have offered exculpatory testimony on his behalf in a separate trial, but that exercise of her marital privilege not to testify in the joint trial prevented the introduction of such testimony. However, the testimony Van Cauwenberghe claims Mat would have given—that a $271,000 wire transfer that Van Cauwenberghe received from Blair was in repayment of an earlier loan to her—is not subject to the marital privilege, which "is not available unless the anticipated testimony 'would in fact be adverse' to the nonwitness spouse." *In re Martenson*, 779 F.2d 461, 463 (8th Cir. 1985) (quoting *United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984)). We do not believe that testimony that Blair's wire transfer to Van Cauwenberghe was in repayment of Mat's loan would have been adverse in any way to Blair's interests in the proceedings. Moreover, "blanket assertions of the privilege are not favored. '[T]he privilege

is not a general one. It must be asserted as to particular questions.'" *Id.* (quoting *Smith*, 742 F.2d at 401) (citation omitted). Joint trial, therefore, did not prevent Mat from testifying on Van Cauwenberghe's behalf and exercising her marital privilege not to testify in response to any particular questions that might have elicited a response adverse to Blair's interests. Furthermore, the "exculpatory" evidence that Mat's testimony would have brought out came fully before the jury in the form of Mat's affidavit stating that the $271,000 wire transfer was in repayment of an earlier loan to her.[*]

[†]

Second, testimony regarding Blair's misrepresentations to Biard and members of the Vanden Stock family outside of Van Cauwenberghe's presence would arguably have been admissible even in a separate trial as probative of the fraudulent scheme underlying the charges. If not, the test is "'whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in light of its volume and limited admissibility.'" *Ramirez*, 710 F.2d at 546 (quoting *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978), *cert. denied*, 439 U.S. 1074 (1979)). "A variety of factors can be relevant to this determination depending upon the facts of the particular case." *Id.*

In this case, there is no claim that Van Cauwenberghe's and Blair's defenses were mutually exclusive. "Only where the acceptance of one party's defense will preclude the acquittal of the other party does the existence of antagonistic defenses mandate severance." *Id.* Van Cauwenberghe only claims that he suffered from aspersions of guilt by association with the more culpable

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[* The preceding sentence was ordered deleted by the Court in its order of September 3, 1987.]

[† At this point an additional paragraph was ordered inserted by the Court in its order of September 3, 1987.]

Blair. However, the mere fact that a criminal defendant is jointly tried with a more culpable codefendant is not alone sufficient to constitute an abuse of the district court's discretion. *See Ramirez*, 710 F.2d at 547 (holding that joint trial with co-defendant against whom there was overwhelming evidence not prejudicial when there was little chance of it "spill[ing] over"). We do not believe that evidence of Blair's guilt spilled over to Van Cauwenberghe. When, as here, the district court instructed the jury to consider the guilt or innocence of each co-defendant separately, in light of the evidence against that defendant, the jury is presumed to have obeyed. *United States v. Rasheed*, 663 F.2d 843, 854-55 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); *Escalante*, 637 F.2d at 1202. Therefore, the district court did not abuse its discretion by denying Van Cauwenberghe's motion for a separate trial.

B. VANDEN STOCK TESTIMONY

Van Cauwenberghe also argues that the district court abused its discretion in admitting the testimony of Roger Vanden Stock regarding communications between defendants and members of the Vanden Stock family and the ultimate transaction between Blair and the Vanden Stocks. This argument is meritless. The specific counts on which Van Cauwenberghe was tried clearly charged that the acts therein were in furtherance of a single scheme to defraud both Biard and the Vanden Stocks. The communications and transactions with the Vanden Stocks constituted "an integral part" of that scheme. *See United States v. Poston*, 727 F.2d 734, 740 (8th Cir.) ("[C]riminal activity is an integral part of the offense charged if it is 'so blended or connected with the one on trial as that proof of one incidentally involves the other or explains the circumstances thereof . . . .' ") (quoting *United States v. Miller*, 508 F.2d 444, 448-49 (7th Cir. 1974)), *cert. denied*, 466 U.S. 962 (1984). Roger Vanden Stock's

testimony was clearly admissible, therefore, because it was highly probative of the fraudulent scheme alleged in the counts on which Van Cauwenberghe was tried.

IV. SEIZURE AND RETENTION OF ASSETS

Van Cauwenberghe argues that the district court erred in denying his motion under Fed. R. Crim. P. 41(e) for the return of the property that was seized from his Swiss accounts. He argues that the property was illegally seized under Article XII of the Treaty and under the fourth amendment of the United States Constitution. In addition, Van Cauwenberghe argues that the district court had no statutory or other legitimate basis on which to retain his property in order to ensure payment of restitution.

To prevail on a Rule 41(e) motion, a criminal defendant must demonstrate that (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government's need for the property as evidence has ended. *See Sovereign News Co. v. United States*, 690 F.2d 569, 577 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *United States v. Hubbard*, 650 F.2d 293, 303 (D.C. Cir. 1980); Fed. R. Crim. P. advisory committee note; 3 C. Wright, *Federal Practice and Procedure* § 673, at 761-65 (2d ed. 1982).

There is no dispute that Van Cauwenberghe was the rightful owner of the property at the time it was seized from his Swiss bank accounts.[4] However, he no longer owns the property. On limited remand from this court.[5] the district court found, and Van Cauwenberghe admits, that he irrevocably transferred full title to the property

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[4] The record does not indicate that the Swiss bank had any proprietary interest in the property, only that it served as a repository for safekeeping.

[5] *see supra* note 3.

to his own attorney and counsel for the United States, acting jointly, to satisfy his restitution condition. Thus, although the district court may have been under a duty to return property that neither was contraband nor had any evidentiary value,[6] *see Hubbard*, 650 F.2d at 303 & n.26, Van Cauwenberghe can no longer demonstrate that he is entitled to lawful possession of the property and, therefore, no longer satisfies the first requirement under Rule 41(e).

[*]

V. THE SENTENCE

The legality of a criminal sentence is subject to de novo review by this court. *United States v. Schiek*, 806 F.2d 943, 944 (9th Cir. 1986). Sentencing that falls within statutory limits, however, is left to the sound discretion of the district court and is reviewed under an abuse of discretion standard. *See United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). Van Cauwenberghe argues that his sentence was improper because (1) he should not have been required to make restitution to Roger Vanden Stock; (2) the amount of restitution ordered was arbitrary and capricious; and (3) requiring him to remain in the United States was improper. We disagree.

The Federal Probation Act, 18 U.S.C. § 3651 (1982), authorizes district courts to require restitution to "aggrieved parties for actual damages or loss caused by the offense for which conviction was had" as a condition of probation. We have interpreted § 3651 to mean that "absent a fully bargained plea agreement, the sentencing

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[6] The stock certificates were not used as evidence, and nothing in the record indicates they had any connection with the crimes committed or alleged. Indeed, the record shows that the certificates had remained dormant since 1973, well before the fraudulent scheme commenced.

[* At this point four additional paragraphs were ordered inserted by the Court in its order of September 3, 1987.]

court may not impose restitution of amounts beyond those alleged in the indictment counts on which conviction is had." *United States v. Whitney*, 785 F.2d 824, 825 (9th Cir. 1986); *United States v. Black*, 767 F.2d 1334, 1344 (9th Cir.), *cert. denied*, 106 S. Ct. 574 (1985). In this case, Van Cauwenberghe was tried and convicted only on the Biard counts, and there was no plea agreement. Therefore, Van Cauwenberghe argues, he should not have been required to make restitution beyond the Biard counts to Roger Vanden Stock.

We have interpreted § 3651, however, to allow restitution to aggrieved parties not named in counts for which probation is ordered. *See United States v. Orr*, 691 F.2d 431, 434 (9th Cir. 1982) (stating that nothing in the language of § 3651 requires an interpretation "that restitution may not be ordered to a party not named in the count for which probation was ordered"). Moreover, the entire scheme to defraud Biard and the Vanden Stock family of 3.6 million dollars was alleged in the indictment counts for which Van Cauwenberghe was convicted. By specifying the total amount alleged to have been fraudulently obtained in the indictment, "the indictment gave [defendant] fair notice of the damages the government intended to prove he caused his victims to suffer and placed a ceiling above which a restitution order would have been improper." *Schiek*, 806 F.2d at 944. The indictment thus put Van Cauwenberghe on notice that the government intended to prove his participation in a scheme to defraud both Biard and the Vanden Stocks of 3.6 million dollars. It was not improper, therefore, to impose restitution for both Biard and Vanden Stock.

The $492,875.15 restitiution figure imposed on Van Cauwenberghe was set at 17.6% of the actual losses resulting from the fraudulent scheme.[7] This amount is

[7] The district court found that Van Cauwenberghe had received 17.6% of the proceeds from the fraudulent venture and based its restitution order on this finding.

much less than either the losses alleged in the indictment or the total actual losses proved at trial. Since joint and several liability for the entire actual loss could have been imposed on each defendant, *see United States v. Tzakis*, 736 F.2d 867, 870-71 (2d Cir. 1984), the district court did not abuse its discretion by imposing this lower figure.

Finally, Van Cauwenberghe contends that the district court's condition that he remain in the United States until restitution is paid is improper. In response to our limited remand on Van Cauwenberghe's emergency motion, the district court found that Van Cauwenberghe's continuing presence in this country no longer serves any probationary purpose.[8] Thus, Van Cauwenberghe's probation may be modified to allow him to return to Belgium. Accordingly, we remand to the district court with instructions to consider modifying this condition of Van Cauwenberghe's probation.

Affirmed and remanded for modification of terms of probation.

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[8] *See supra* note 3.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

DC# CR 84-963-3-AAH
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed March 4, 1986]

ORDER

Before: TANG and POOLE, Circuit Judges

Appellant is directed to file a supplemental financial affidavit that sets forth a complete accounting of his current assets and financial status.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

DC# CR 84-963-3-AAH
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed March 26, 1986]

ORDER

Before: TANG and POOLE, Circuit Judges

Appellant's motion for leave to proceed in forma pauperis is granted.

The motion of John G. Kester, Esq., to be appointed as counsel of record on appeal is granted. Kester will be appointed by separate order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

DC# CR 84-963-3-AAH
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed Dec. 31, 1986]

ORDER

Before: CANBY and REINHARDT, Circuit Judges

Appellant requests the court to modify the condition of probation requiring him to remain in the United States until restitution in the amount of $492,875.15 is paid. Appellant requests that he be allowed to travel to Belgium. Appellee opposes the motion.

The parties disagree over the factual question of the degree to which appellant has relinquished control of his assets to his counsel and appellee's counsel. This case is remanded to the district court for further findings as to

whether appellant has relinquished control of sufficient assets to pay the full restitution in due course, and whether appellant has released control to the extent that he cannot regain control over those assets if he is allowed to return to Belgium. In addition, the district court shall make findings as to whether there is any other probationary purpose to be served by retaining appellant in the United States under the circumstances of this case.

The district court shall resolve this matter at its earliest convenience and forward a copy of the order to this court.

APPENDIX F

Transcript of Proceedings, *United States* v. *Blair, et al.*, No. CR 84-963-AAH, U.S. District Court, Central District of California, Dec. 17, 1985 and Jan. 22, 1986.

[17] MR. KESTER [Petitioner's counsel]: . . . [A]s your Honor will recall, there is a substantial sum of his assets that are being held in [18] custodia legis . . .

THE COURT: What are you talking about? In custodia legis?

MR. KESTER: A substantial amount of Mr. Van Cauwenberghe's assets were brought over from Switzerland. We had a hearing before your Honor on that before the trial began.

THE COURT: I can't remember. What were they? Bonds and stocks?

MR. KESTER: They were stocks in two Spanish or Panamanian companies owning land in Spain that had nothing to do with the facts of the case, but they were nevertheless brought over.

* * * *

[19] THE COURT: Well, the case is over. I will release them from the custodia legis. I will release those things. I don't see any point to holding them. They are not going to be used in evidence.

MR. KESTER: Thank you, your Honor.

MR. ARTERBERRY [Prosecutor]: Your Honor, those assets, the Court may recall, have become the subject of a civil action that is pending here.

THE COUT: I didn't know that.

MR. TWITTY [Counsel for other defendant]: Mr. Arterberry is finally showing his true colors. He has become a civil lawyer now.

THE COURT: Wait a minute. Wait a minute now. If the government is trying to forfeit them by means of a civil case.

MR. TWITTY: The government is not, Judge. The government is not party to this.

MR. ARTERBERRY: The government will be happy to speak for itself.

THE COURT: I say if the government is trying to forfeit them in a civil action, which is the appropriate way to do it in this kind of a case—this is not a RICO case where the government has to use the criminal process to forfeit anything that was used in the alleged crime—but if you are trying to get them released for some private [20] party—

MR. KESTER: That is exactly what he is trying to do.

THE COURT: Such as Biard or one of those other fellows.

MR. ARTERBERRY: Your Honor, I would be happy to speak for the government.

THE COURT: Yes, let him speak. What is it that you want to tell me?

MR. ARTERBERRY: The government will seek restitution from these defendants. Those funds or whatever value the stock may have—and that is not clear at all—but whatever value it may have it may go towards the satisfaction of any restitution the Court may find appropriate.

THE COURT: That is another problem.

MR. ARTERBERRY: It is, your Honor, but it does reflect the interest the parties have in these funds.

MR. KESTER: Your Honor, these funds were brought over here simply on the representations of the government that they might constitute evidence in some respect. It has been shown before the case, before the trial, eminently during the trial, that these funds, these assets, had nothing to do with anything that happened in this case, and the government has no business trying to—

[21] THE COURT: I know, but on the other hand, if it is in custodia legis, and we have a question of res-

titution, which we do and which I have to order under the law since the verdicts are guilty, it seems to me they should stay in custodia legis. So ordered.

MR. KESTER: Your Honor, if you will recall, we discussed this matter in our pretrial motion and pointed out to the Court that there is no authority in the statute or anywhere in the case law for holding property pending restitution. There is specific statutory authority for holding property pending forfeiture if certain showings are made. There is statutory authority for a fine after—

THE COURT: I am going to make case law then. You take it up to the Ninth Circuit if you don't like it. So ordered.

* * * *

[215] THE COURT: Well, as I make it payable into the registry of the Court, you still have to get an order of the Court [to] get what's in there already out.

MR. KESTER: Right, and I take it your Honor would issue an order to the clerk to hand over the assets to me for purposes of getting them liquidated as quickly as possible.

THE COURT: Well, if I hear no objection from the government.

MR. ARTERBERRY: Your Honor, the only reservation the government would have is that these assets are turned over to counsel and he does that under some custodial—

THE COURT: I'll make them turned over to you [216] both of you as co-counsel, you as government's counsel and—

MR. ARTERBERRY: Very well, your Honor.

THE COURT: —Mr. Kester, both of you and then you try to liquidate it.

MR. ARTERBERRY: Very well, your Honor.

MR. KESTER: I would undertake, your Honor, to do it myself. I don't think Mr. Arterberry has to be involved in the transaction.

THE COURT: Well, he gets worried so let him get involved, at least he'll be peeking over your shoulder.

MR. KESTER: I'm afraid that might impede the liquidation.

THE COURT: I doubt it. I rather see him liquidate it than sit around as packages in court—in the registry of the Court.

MR. ARTERBERRY: That makes sense, your Honor.

THE COURT: All right. Any legal reason why sentence should not now be pronounced.

* * * *

[223] MR. KESTER: . . . With respect to the assets that Mr. Arterberry and I are going to try to liquidate, may we pick those up from the clerk tomorrow?

THE CLERK: You'll need a signed order.

MR. KESTER: We'll submit an order.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 84-963-AAH

UNITED STATES

v.

ALAN H. BLAIR, *et al.*,
Defendants.

[Filed Jan. 23, 1986]

ORDER

In accordance with the sentence of this Court that defendant Van Cauwenberghe pay a fine and restitution, and to assist prompt payment thereof, it is by the Court hereby ordered as follows:

1. Counsel for defendant Van Cauwenberghe, subject to the oversight of counsel for the United States, shall promptly seek to sell or otherwise liquidate all assets currently held in the registry of the Court that were transmitted to the Court pursuant to the extradition of defendant Van Cauwenberghe from Switzerland. Negotiations for the sale or liquidation of such assets shall be subject to the advance approval and full monitoring of counsel for the United States.

2. Closing of a sale or other liquidation of said assets up to the amounts ordered to be paid by the Court shall be monitored by counsel for the United States and is subject to approval by counsel for the United States. If such approval is not given promptly when requested, the

proposed sale or liquidation may be submitted to the Court for approval.

3. In order that the sentence of this Court and the terms of this order may be carried out promptly, the Clerk of this Court is hereby directed to deliver forthwith all assets and accompanying materials hereinabove referred to and currently in the registry of this Court to the joint custody of John D. Arterberry, counsel for the United States, and John G. Kester, counsel for defendant Van Cauwenberghe.

4. Upon sale or other liquidation of the aforesaid assets, counsel for defendant Van Cauwenberghe shall transmit to the Clerk of this Court for deposit in the registry of this Court the amount realized from such sale or liquidation, in cash or cash equivalents. All sums so transmitted up to the amount of restitution ordered shall be retained in the registry by the Clerk until final disposition of appellate review of this case.

SO ORDERED this 23d day of January, 1986.

/s/ A. Andrew Hauk
Senior United States District Judge

The undersigned jointly submit the foregoing proposed order and request approval by the court.

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Counsel for the United States

1-23-86

/s/ John G. Kester
JOHN G. KESTER
Counsel for Defendant Van Cauwenberghe

1-23-86

APPENDIX H

JUDGMENT AND PROBATION COMMITMENT ORDER

January 22, 1986

There being * * * a verdict of GUILTY, on counts 1 & 2 Defendant has been convicted as charged of the offense(s) of interstate transportation of a victim of fraud; aiding and abetting; causing an act to be done in violation of Title 18 USC 2314 and 18 USC 2 as charged in count 1 and wire fraud; aiding and abetting; causing an act to be done in violation of 18 USC 1343 as charged in count 2. The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day and the defendant shall become eligible for parole pursuant to Title 18 U.S.C. 4205(a) upon serving one-third of the sentence of imprisonment herein imposed and the defendant shall pay a fine to the United States in the sum of $10,000.00 on count 1 of the indictment.

IT IS ORDERED that on count 2 the defendant shall pay a fine to the United States in the sum of $1,000.00 and the imposition of the sentence of imprisonment only is hereby suspended and the defendant is placed on probation for a period of five (5) years to commence upon his release from confinement and on the following terms and conditions: 1—that he obey all local, state and federal laws; 2—that he comply with the rules and regulations of the probation office and General Order No. 225; 3—that he make restitution in the total sum of $492,875.15 of which $34,501.26 shall be paid to Roger Biard and $458,373.89 shall be paid to Roger Vanden-

stock; 4—that the fines and restitution herein imposed shall be paid in such amounts and on such terms and conditions as the probation office may impose having due regard for the defendant's income, employment status and family expenses; 5—that the defendant shall not participate in any way in any ventures or deals in land and real estate, excluding the liquidation of any property to pay the restitution and fines herein imposed, and that he not participate in any wire transfers of money or any other assets except to his family and that the probation office shall approve any such transfers and the defendant not engage in any money laundering; 6—that the defendant shall not leave the United States until restitution is paid; said sentence on count 2 shall run consecutive to count 1 as to the fine and concurrent as to imprisonment and suspended sentence.

IT IS ORDERED that the defendant be given credit for time served of three-hundred seventy three (373) days. . . . .

IT IS ORDERED that the defendant, whose address is: 30 Avenue Edouard Lacomble, Etterbeek 1040 Brussels, Belgium, pay a total fine to the United States of America in the sum of $11,000.00 . . .

* * * *

/s/ A. Andrew Hauk
A. ANDREW HAUK
Date 1-22-86

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 84-963-AAH

UNITED STATES

vs.

ALAN H. BLAIR, *et al.*,
Defendants.

[Filed Feb. 17, 1987]

FINDINGS OF FACT

In response to the Order of the United States Court of Appeals for the Ninth Circuit filed December 31, 1986, this Court upon consideration of the evidence submitted hereby finds by preponderance of the evidence the following:

1. Defendant Van Cauwenberghe has relinquished control of sufficient assets, consisting of capital shares of Abamar Corporation and Batimar Corporation, to pay the full restitution ordered in this case in due course. The total value of the assets of which he has relinquished control appears to be in excess of $1 million. The amount of restitution ordered is $492,875.15. Those assets are in the process of being sold and will be liquidated when the sales are completed.

2. Defendant Van Cauwenberghe has relinquished control of those assets and he cannot regain control over

them if he is allowed to return to Belgium. Defendant Van Cauwenberghe has irrevocably transferred full title to them to counsel for the United States and his own counsel, acting jointly. No action may be taken with respect to those shares except by the joint direction of both his own counsel and counsel for the United States. Defendant Van Cauwenberghe no longer has any ability to affect those assets in any way. His return to Belgium will not in any way allow him to regain control of those assets.

3. In the present circumstances, no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States.

In accordance with the Order of the Court of Appeals, it is by the Court this 13th day of February, 1987, hereby

ORDERED that the foregoing findings of fact be transmitted by the Clerk to the United States Court of Appeals for the Ninth Circuit forthwith.

/s/ A. Andrew Hauk
Senior United States District Judge

Dated: February 13, 1987, aff'd in oral hearing during which the Court read into the record the aforesaid 3 findings. Dated Feb. 17, 1987

/s/ Hauk

APPENDIX J

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

February 24, 1933

The Honorable

The Secretary of State

My dear Mr. Secretary:

The existing situation respecting the scope and operation of treaties between the United States and foreign nations relating to extradition is very unsatisfactory from the standpoint of the Department of Justice in that they do not seem to provide for extradition from foreign countries at the request of the United States of persons charged under Federal law with using our mails to defraud. Revelations made during the last year or two of the operation of individuals and corporations within the United States in selling to the public vast amounts of securities upon false representations as to their value, and in connection with which the United States mails have been used, have shocked the moral sense of the nation. In my judgment, malefactors of this type, in the wreckage and losses they have inflicted, have done more harm to the average citizen then the perpetrators of a great variety of crimes which are extraditable offenses. I am informed that the difficulty with our extradition treaties in this respect is that they do not cover cases where the mails are used as an instrument of fraud, and that the probable reason for this is that foreign nations, not having the dual system of sovereignties, state and national, which we have, do not enact statutes of their own punishing the use of the post for fraud but prosecute under other kinds of criminal statutes.

We have had a number of instances in which persons engaged on a large scale in violating the mail fraud statutes of the United States have gone to foreign countries to escape prosecution. Just recently there was brought to my attention the case of one Frank P. Parish of Chicago, who was indicted in the United States District Court in Illinois for the use of the mails to defraud in connection with the stock of the Missouri-Kansas Pipe Line Company. This is an important case in which large frauds have been perpetrated on innocent victims and the offense is as heinous as any sort of crime against property and human rights. I have just learned that the defendant has absconded and left for some foreign country to escape trial and punishment. The amount of his bond is insignificant compared with the nature of his offense. I am writing in the hope that the officials of your Department having to do with the subject of extradition treaties will give this subject careful consideration with a view to negotiating modifications of the existing extradition treaties which will enable the United States to extradite persons charged with using the United States mails to defraud. It seems to me that if foreign nations are willing to allow extradition of persons charged with the substantive crime of fraud under state laws, they should offer no objection to the extradition of persons charged with using the mails of the United States for that purpose.

Respectfully yours,

/s/ William D. Mitchell
WILLIAM D. MITCHELL
Attorney General

[The Secretary of State]

February 28, 1933

In reply refer to
Le

The Honorable

The Attorney General.

Sir:

I have received your letter of February 24, 1933, in which you call attention to the fact that recently several persons charged in this country with using the mails to defraud have fled to foreign countries to escape prosecution and you urge that steps be taken looking to agreements with foreign countries to render this offense extraditable.

As you recognize, the offense in question is not covered by any of the extradition treaties of the United States and my information indicates that this condition is due to the fact that countries, other than the United States, have not enacted laws defining and penalizing as such the offense in question.

The experience of this Department seems to show that generally speaking governments are unwilling to agree to extradite persons upon charges of an offense which is not defined and penalized in their own laws and in view of this it may well prove impracticable to bring about such agreements with foreign countries as you desire to be made. However, the Department is making a start in the desired direction by a request to the Government of Canada, which country, because of its proximity to the United States, is probably resorted to by fugitives from our justice more frequently than any other, that it agree with this country to add to the list of offenses now covered by extradition treaties in force

as between the two countries, the offense of using the mails to defraud.

Upon receipt of a response from the Canadian Government the matter in which you are interested will be given further consideration and your Department will be informed in the premises.

Very truly yours,

/s/ Henry L. Stimson
HENRY L. STIMSON

APPENDIX K

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Constitution, Fourth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Fifth Amendment, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Sixth Amendment, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Eighth Amendment, provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18 U.S.C. § 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 2314 provides:

* * * *

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

Title 18 U.S.C. § 3651 provides:*

Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

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* The quoted language is the version of the statute applicable at sentencing. Changes not material here later became effective.

The court may invoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

. . .

Federal Rule of Criminal Procedure 41(e) provides:

Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

The Treaty of Extradition Between the United States and Switzerland, 31 Stat. 1928, provides:

Treaty between the United States and Switzerland for the extradition of criminals. Signed at Washington May 14, 1900; ratification with amendments advised by the Senate June 5, 1900; ratified by the President

February 25, 1901; ratified by Switzerland January 21, 1901; ratifications exchanged at Washington February 27, 1901; proclaimed February 28, 1901.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the Swiss Confederation providing for the extradition of criminals was concluded and signed by their respective Plenipotentiaries at Washington on the 14th day of May, one thousand nine hundred, the original of which Convention, being in the English and French languages is, as amended by the Senate of the United States, word for word as follows:

The Government of the United States of America and the Federal Council of the Swiss Confederation, with a view to the better administration of justice, have resolved to conclude a new Convention for the extradition of fugitive criminals, and, for that purpose, have appointed as their Plenipotentiaries, to wit:

The President of the United States of America: John Hay, Secretary of State of the United States; the Federal Council of the Swiss Confederation: J. B. Pioda. Envoy Extraordinary and Minister Plenipotentiary of Switzerland to the United States; Who, after communicating to each other their full powers, which were found in good and due form, have agreed upon the following Articles.

ARTICLE I.

The Government of the United States of America and the Swiss Federal Council bind themselves mutually to surrender such persons as, being charged with or convicted of any of the crimes or offenses enumerated here-

inafter in Article II, committed in the territory of one of the contracting States, shall be found in the territory of the other State: Provided that this shall be done by the United States only upon such evidence of criminality as, according to the laws of the place where the fugitive or person shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. In Switzerland, the surrender shall be made in accordance with the laws in force in that country at the time of the demand.

Neither of the two Governments, however, shall be required to surrender its own citizens.

ARTICLE II.

Extradition shall be granted for the following crimes and offenses, provided they are punishable both under the laws of the place of refuge and under those of the State making the requisition, to wit:

1. Murder, including assassination, parricide, infanticide and poisoning; voluntary manslaughter.

2. Arson.

3. Robbery; burglary; housebreaking or shop-breaking.

4. The counterfeiting or forgery of public or private instruments; the fraudulent use of counterfeited or forged instruments.

5. The forgery, counterfeiting or alteration of coin, paper-money, public bonds and coupons thereof, bank notes, obligations, or other certificates or instruments of credit, the emission or circulation of such instruments of credit, with fraudulent intent; the counterfeiting or forgery of public seals, stamps or marks, or the fraudulent use of such counterfeited or forged articles.

6. Embezzlement by public officials, or by other persons, to the prejudice of their employers; larceny; obtaining money or other property by false pretences; receiving

money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained. The amount of money or the value of the property obtained or received by means of such criminal acts, must exceed 1000 francs.

7. Fraud or breach of trust, committed by a fiduciary, attorney, banker, administrator of the estate of a third party, or by the president, a member or an officer of a corporation or association, when the loss involved exceeds 1000 francs.

8. Perjury; subornation of perjury.

9. Abduction; hape; kidnapping of minors; bigamy; abortion.

10. Wilful and unlawful destruction or obstruction of railroads, endangering human life.

11. Piracy; wilful acts causing the loss of destruction of a vessel.

ARTICLE III.

Extradition shall likewise be granted for an attempt to commit, or participation in, any of the crimes and offenses enumerated in Article II, provided such attempt or participation is punishable in the United States as a felony, and in Switzerland with death, or confinement in a penitentiary or workhouse.

* * * *

ARTICLE IX.

No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted, unless he expressly consents to it in open Court, which consent shall be entered upon the record, or unless, having been at liberty during one month after his final release to leave the territory of the State making the demand, he has failed to make use of such liberty.

The State to which a person has been surrendered shall not surrender him to a third State, unless the provisions contained in the first paragraph of the present Article have been fulfilled.

* * * *

ARTICLE XII.

All articles seized which are in the possession of the person demanded, at the time of his arrest, shall, at the time of the extradition be delivered up with his person, and such delivery shall extend, not only to articles acquired by means of the offense with which the accused is charged, but to all other articles that may serve to prove the offense.

The rights of third parties to the articles in question shall, however, be duly respected.

* * * *

In witness whereof, the respective Plenipotentiaries have signed the foregoing Articles, and have affixed their seals.

Done in duplicate at Washington, in the English and French languages, the 14th day of May 1900.

JOHN HAY [SEAL.]

J. B. PIODA [SEAL.]

And whereas the said Convention as amended by the Senate of the United States has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the 27th day of February, one thousand nine hundred and one;

Now therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington, this twenty-eighth day of February in the year of Our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

WILLIAM MCKINLEY

[SEAL.]

By the President:

JOHN HAY

Secretary of State.

[French text omitted.]